

**Republic Resources Limited**

*Appellant*

v.

**NZI Leasing Corporation Limited**

*Respondent*

FROM

**THE COURT OF APPEAL OF NEW ZEALAND**

-----  
JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE  
25TH JULY 1990  
-----

*Present at the hearing:-*

LORD KEITH OF KINKEL  
LORD TEMPLEMAN  
LORD GRIFFITHS  
LORD ACKNER  
LORD LOWRY

*[Delivered by Lord Ackner]*

-----  
This is an appeal from a judgment of the Court of Appeal of New Zealand (Cooke P., Casey and Doogue JJ.) dated 15th December 1989 dismissing with costs an appeal by the appellant (Republic) from the judgment of the High Court of New Zealand dated 26th May 1989 whereby Master Hansen gave summary judgment in favour of the respondent (NZI) against Republic for A\$1,304,508 plus interest and costs.

At the material time Saga Minerals NL (Saga) was a wholly owned subsidiary of Republic, a publicly listed New Zealand company, which held a mining lease and licences to enable it to develop a mine on the Rocky River in northern New South Wales, Australia. Mr. Michael McKenzie was the chief executive, the largest shareholder in Republic and one of its directors. He was also a director of Saga. Dr. Ambler was the general manager of Republic and Saga and he also was a director of both companies. Republic decided that Saga should carry out the development and operation of the mine but Saga required finance, in particular for the acquisition of plant.

The first successful application for finance was achieved in September 1987 when Saga obtained from NZI an initial advance of A\$260,000 in order to enable Saga to lease an excavator shovel combination. The

performance by Saga of its obligations contained in the lease dated 17th September 1987 entered into with NZI in respect of this transaction was guaranteed by Republic. NZI's first cause of action against Republic was based upon Saga's failure to comply with the terms of this lease and resulted in the Master giving judgment for the sum of A\$259,099 together with interest from 9th July 1988. On the hearing of this appeal no submissions were made to their Lordships that Republic had any defence to that claim. It is with the second application made on 23rd September 1987 for a total of A\$1,400,000, (including the A\$259,099 already advanced), which was approved on 29th September, that this appeal is concerned. As a result of discussions between Mr. McKenzie, Dr. Ambler and Mr. Duly of NZI, the procedure to be adopted was for NZI to acquire items of plant at certain agreed prices, which would then be leased to Saga by NZI, the payments by Saga under the lease being guaranteed by Republic. To this end a written agreement dated 6th October 1987 was executed under seal. Saga did not pay the instalments due under the agreement and subsequently became insolvent. Demands having been made on Republic under the guarantee, NZI sought and obtained summary judgment for A\$1,045,409 with interest, credit being given for the sale of certain machinery by NZI. It is this judgment which is the subject matter of the appeal.

#### The agreement of 6th October 1987

As previously stated, the parties to this agreement were NZI, referred to in the agreement as "the Lessor", Saga referred to as "the Lessee", and Republic referred to therein as "the Guarantor". The agreement recited that the Lessor had agreed at the request of the Lessee to purchase equipment described in the schedule to the agreement for the purpose of leasing the same to the Lessee.

Under clause 1.1 of the agreement it was agreed as follows:-

"As and when the Lessee wishes the Lessor to make any payment to the supplier of the Equipment (hereinafter called 'the Supplier') by way of deposit or any part of the purchase price or any of the charges in connection therewith, the Lessee shall in the form of the Schedule annexed hereto and marked with the letter 'B' notify the Lessor of the amount of such payment and the Lessor shall thereupon pay to the Supplier the amount so notified PROVIDED ALWAYS that the Lessee shall tender such evidence of the fact that the amount notified is due and payable to the Supplier and that the title in the Equipment or any part thereof will thereupon pass to the Lessor as the Lessor may in any case reasonably request and which amount when aggregated with any of the amounts previously

paid hereunder shall not exceed the amount set opposite the Equipment in the Schedule hereto by more than ten per centum (10%) per centum thereof."

By clause 7.2 the Guarantor covenanted and agreed with the Lessor as follows:-

- "(a) The Guarantor will immediately upon demand by the Lessor in the event of default by the Lessee under or by virtue of this Deed pay to the Lessor all moneys guaranteed by the Guarantor hereunder.
- (b) The liability of the Guarantor hereunder shall not be abrogated prejudiced or affected by the granting of time credit or any forbearance indulgence or concession to the Guarantor or any other guarantor or to the Lessee or by any compounding compromise release abandonment waiver variations relinquishment or renewal of any securities documents of title or assets or of any rights of the Lessor or by any omission or neglect or by any other dealing matter or thing which but for this provision could or might operate to abrogate prejudice or affect this Deed or by reason of any security or other guarantee held or taken at any time by the Lessor or by reason of the same being void voidable or unenforceable or by any moratorium or other period staying or suspending by statute or the order of any court or other authority all or any of the Lessor's rights remedies or recourse against the Lessee, it being the intent of the parties hereto that the guarantee and obligation of the Guarantor hereunder shall be absolute and unconditional in any and all circumstances."

The schedule to the agreement identified the equipment which NZI had agreed at the request of Saga to purchase. The first item had however been deleted since, by the time the agreement of 6th October was executed, it had already been made the subject matter of the agreement of 17th September referred to above. The remaining items were thus described:-

- "2. O & K Type 70 Bucket Wheel Excavator  
\$160,000
- 3. Caterpillar 980 Front End Loader - \$50,000
- 4. Mobile Screener - designed and constructed by Saga. Including: Feed hopper, grissley and washdown screen Syntron feeder, conveyor, Jaques 16' x 6' double deck vibrating screen, screen underflow hopper, Warman 8/6 pump, Cummins 350 kVa generator, electrical switchboard, motors and fittings, screener chassis & base, PVC pipe - \$300,000 - \$320,000.

5. Process plant - purchased, designed and constructed in part by Saga. Including:

(a) Prep plant and other equipment - \$50,000.

(b) Feed plant and other equipment - \$70,000.

(c) Vickers spiral separation plant and other equipment - approx. \$220,000.

Total Process Plant - \$320,000 - \$340,000

Payment on deliver of invoices."

It will be observed that item 4, the mobile screener, had been designed and constructed by Saga and that item 5, the process plant, had been purchased, designed and constructed in part by Saga.

Item 2, the O & K Type 70 Bucket Wheel Excavator, was invoiced by Saga to NZI on 7th October in the sum of A\$160,000, the price stipulated in the schedule, and duly paid by NZI. Apparently Saga did not take delivery of the third item in the schedule and no invoice was rendered with regard to this piece of equipment.

As regards item 5 in the schedule item (a) was invoiced by Saga to NZI at A\$55,000, and item (b) at A\$75,000 on 7th October 1987, both sums being within the 10% tolerance allowed. By an invoice bearing the same date part of item 5(c) was invoiced to NZI at A\$120,000. Thus the total sum invoiced and paid in relation to the whole of item 5 in the schedule was A\$250,000.

Mr. Atkinson Q.C., on behalf of Republic, renewed his submission made in the Court of Appeal that clause 1.1 and the schedule laid down a procedure under which the amount of Republic's liability as guarantor was protected by the fact that the payments by NZI for the plant and the equipment were to be made by it to independent suppliers and not to Saga and further that the total payments would not exceed the amounts set opposite the items of equipment in the schedule by more than 10%. As to his latter contention, this only relates to item 4, the mobile screener referred to in more detail later, where the 10% tolerance was exceeded by A\$48,000. As to his contention that the procedure laid down in the schedule was not adhered to, that procedure had no relevance to item 4, which had been designed and constructed by Saga, nor to item 5, the process plant, which had been purchased, designed and constructed in part by Saga. In his affidavit of 16th February 1989 sworn on behalf of Republic Mr. McKenzie stated in paragraph 10 that the total plant requirements of Saga had not been finalised and that some plant was already on the site and working, having been funded by other

group funds on a temporary basis. Moreover it is clear from annexure "B" to the agreement of 6th October 1987 that it was contemplated that the equipment described in the schedule, by the time application was made for payment pursuant to clause 1 of the agreement, would have been purchased by Saga from the suppliers and accepted by Saga.

Their Lordships are quite satisfied that, if and insofar as the procedure provided by clause 1.1 was not strictly adhered to, the only complaint which can be made is in relation to item 2 on the schedule, the O & K Type 70 Bucket, which was invoiced in the sum stipulated in the schedule, but the invoice was rendered by Saga direct to NZI. Mr. Atkinson maintained that Republic did not consent to the procedure being thus varied and that this had the effect of discharging Republic's obligation under the guarantee. In *Egbert v. National Crown Bank* [1918] A.C. 903 at 908 Lord Dunedin observed:-

"The true view, in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is, without enquiry, evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged."

Even if there was no consent, the alteration was in the circumstances so insubstantial and in no way unprejudicial to Republic as to be incapable of discharging Republic's obligation under the guarantee. However, for the reasons stated hereafter, their Lordships are quite satisfied that Republic did in fact consent to the variation.

It became apparent that monies already advanced or agreed to be advanced to Saga would be inadequate for its needs and on 29th October 1987 an important letter was written by Dr. Ambler to NZI. This letter set out the items which had by then been invoiced and paid for by NZI which comprised items 2 and 5(c). At the time the letter was written, item 4, the mobile screener, had not then been invoiced by Saga and accordingly in the final paragraph of the letter Saga's invoice for this equipment in the sum of A\$400,000 was stated to be enclosed. Allowing for the 10% tolerance this was, as previously stated, A\$48,000 in excess of the tolerance specified in the schedule. Further, by the time this letter was written an invoice dated 23rd November had been rendered to NZI by Saga in respect of a slurry pipeline and other equipment not specified in the Schedule in the sum of A\$266,000.

Enclosed in this letter, in order to persuade NZI to provide further finance, were valuations provided by a Mr. Griffiths, a consulting engineer, of the plant and equipment which had already been paid for by NZI.

The aggregate of these valuations together with the sum invoiced in respect of the slurry pipeline and other equipment aggregated a sum in excess A\$1,600,000. The penultimate paragraph of this letter reads:-

"These valuations indicate that the 'Schedule' in the 'Agreement to the Lease' between NZI Leasing Corporation Ltd and Saga Minerals NL is inadequate and will require amendments."

There can be no doubt that this letter was written with not only the knowledge but with the full concurrence of Republic.

There was no reply to this letter, but following its receipt, the invoice of 23rd November in respect of the slurry pipeline and other equipment in the sum of A\$266,000 was paid, as was the invoice sent with the letter in respect of the mobile screener in the sum of A\$400,000.

The Court of Appeal drew the conclusion, with which their Lordships fully concur, that:-

"Republic knew what was going on between NZI Leasing and Saga over the acquisition of and payment for this equipment, and must have accepted the different arrangements and additional payments as being in the interests of both companies. Indeed, Republic can hardly be heard to complain that the assets may have been over-priced in the Saga valuations accepted and paid by NZI Leasing, when its own general manager and director in his letter of 29th October 1987 put forward increased figures - in some cases substantial - as acceptable valuations of plant acquired by the lessor."

Their Lordships accordingly agree with the Court of Appeal that Republic must be regarded as having known and consented to the different arrangements for the payments made by NZI for the assets. Any other conclusion, as the Court of Appeal observed, flies in the face of commercial reality.

Before their Lordships Mr. Atkinson raised a technical point which had not been raised in the Court of Appeal. He contended that any variation of the guarantee would require to be in writing under the Contracts Enforcement Act 1956 which is in all material respects identical to the Statute of Frauds 1677. Their Lordships are satisfied that the short answer to this point is that the letter of 29th October provides the necessary note or memorandum. The only proper inference is that the letter of 29th October was written by Dr. Ambler not only on behalf of Saga but with the full knowledge and concurrence of the parent company Republic.

In view of the conclusion reached by their Lordships, the alternative submission, which NZI successfully made in the Court of Appeal, that in any event Republic's liability was preserved by clause 7.2(b) set out above, does not arise. It is however their Lordships' view that the liability preserved under this clause is the liability to guarantee payments to the total figure of A\$957,000. Accordingly, the liability preserved by this clause cannot exceed this figure.

Mr. Atkinson did not raise before their Lordships the composite financing agreement point, which he had argued before the Court of Appeal. He did however raise again the allegation that, after Saga's collapse, NZI sold mining assets to which it was not entitled, thereby rendering itself liable to damages for conversion, which should be set off against NZI's claim. This was very much a subsidiary submission. Their Lordships agree with the Court of Appeal that, although Mr. McKenzie may have suspected that plant might have been wrongly sold, his suspicions did not give rise to an arguable defence by a way of a set off against a claim that was otherwise clearly established.

Their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed. The appellant must pay the respondent's costs.